

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matters of	)	
	)	
AT&T MOBILITY, LLC	)	WT Docket No. 13-10
	)	
Petition for Waiver of Cellular License	)	
Application Rules Concerning Service Area	)	
Boundary Extensions	)	
	)	
NEW CINGULAR WIRELESS PCS, LLC	)	File No. 0004862565
	)	
Application for Major Modification of License	)	
For Cellular Service in the Virginia 1 – Lee	)	
Cellular Market Area (Market 681B),	)	
Call Sign KNKN791	)	

To: Wireless Telecommunications Bureau

**COMMENTS OPPOSING PETITION FOR WAIVER;  
REQUEST FOR DISMISSAL OF APPLICATION**

East Kentucky Network, LLC d/b/a Appalachian Wireless (“EKN”), a provider of wireless service in eastern Kentucky and southwestern Virginia, hereby responds to a Public Notice of the Wireless Telecommunications Bureau (“Bureau”) inviting comments on a petition filed on behalf of New Cingular Wireless PCS, LLC (“New Cingular”) by AT&T Mobility, LLC (“AT&T”) for waiver of Sections 1.923(a)<sup>1</sup> and 22.911(d)<sup>2</sup> of the Rules (“Petition”).<sup>3</sup> EKN welcomes this chance to offer comments and requests that the Bureau deny the Petition and waiver request. Upon

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<sup>1</sup> 47 C.F.R. § 1.923(a). Section 1.923(a) of the Commission’s rules (“Rules”) establishes a requirement that wireless radio service applications include “all information requested on the applicable form and any additional information required by . . . any rules pertaining to the specific service for which the application is filed.”

<sup>2</sup> 47 C.F.R. § 22.911(d). Section 22.911(d) prohibits a cellular licensee from commencing operation of any facility that would cause a service area boundary (“SAB”) “to overlap the existing CGSA [Cellular Geographic Service Area] of another cellular system on the same channel block, without first obtaining the written consent of the licensee of that system.”

<sup>3</sup> *Public Notice*, DA 13-44, released February 5, 2013 (“Public Notice”) by the Wireless Telecommunications Bureau. The deadline for submission of these Comments is February 20, 2013.

denial of rule waivers, the Bureau should deem the above-captioned application incomplete and defective, and dismiss the application in accordance with Section 1.925(c)(ii) of the Rules. In support of these requests the following is respectfully shown:

## **I. Background**

EKN is among a group of four cellular licensees that have not granted consent to SAB extensions proposed by New Cingular and with whom negotiations, according to AT&T, are at an impasse.<sup>4</sup> The four named cellular system operators are unaffiliated and geographically dispersed, and each is a small or regional wireless competitor of AT&T.

AT&T's affiliate, New Cingular, filed an application for a major modification of license for cellular service in the Virginia 1 – Lee Cellular Market Area (“VA 1”), call sign KNKN791.<sup>5</sup> That application, as New Cingular acknowledges, proposes extensions of New Cingular cell contours on frequency Block B into the CGSA of EKN's co-channel cellular systems in the Kentucky 9 – Elliott (“KY 9”) and Kentucky 10 – Powell (“KY 10”) market areas.<sup>6</sup> Such extensions are prohibited by Section 22.911(d) of the Rules absent an agreement with the cellular licensee into whose CGSA the contours would extend.<sup>7</sup>

Complaining that EKN would not agree to the proposed incursion into its CGSA, New Cingular, on October 10, 2012, submitted the Petition as a supplement to its application. AT&T

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<sup>4</sup> The Public Notice refers to AT&T's assertion that it has “pursued negotiations with the [four] neighboring licensees, some resulting in an impasse (Group I applications).” [fn. omitted] Those neighboring licensees are EKN, C Spire, NE Colorado Cellular, Inc. and Wilkes Cellular, Inc. The Public Notice also refers to a second waiver petition filed by AT&T that concerns a lack of agreement with three additional carriers where there is a “promise of success but no resolution thus far (Group II applications).”

<sup>5</sup> FCC File No. 0004862565.

<sup>6</sup> EKN holds frequency Block B cellular licenses for the KY 9 and KY 10 Cellular Market Areas under the call signs KNKN880 and KNKN909, respectively. New Cingular's proposed extensions also encroach upon EKN's CGSA in a portion of the Virginia 1 CMA, although New Cingular does not recognize or acknowledge that fact in the subject application. See Section II.B. of these Comments.

<sup>7</sup> See Section 22.911(d)(2)(i).

and New Cingular ask the Bureau to override the rights of EKN to CGSA protection that is explicitly afforded by Section 22.911(d) of the Rules. Neither the amendment nor the Petition was served on EKN or its contact representative who is listed in the Bureau's cellular license data base.

## **II. The Petition Should be Denied**

For any of a variety of reasons, the Bureau should deny the AT&T waiver requests.

### **A. AT&T Failed to Satisfy the Waiver Standard of Section 1.925(b) of the Rules**

An applicant for a rule waiver “faces a high hurdle even at the starting gate” for it ““must plead with particularity the facts and circumstances”” which warrant the waiver. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1968) (quoting *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968)). *See Rules Governing Hearing Aid-Compatible Telephones*, 22 FCC Rcd 7171, 7176 (2007) (“*Section 20.19 Waiver*”). The high hurdle faced by an applicant for a waiver of a wireless rule is the waiver standard set forth in Section 1.925(b) of the Rules. That standard burdens the applicant to plead with particularity the facts and circumstances showing either that: (1) the underlying purpose of the rule would not be served or would be frustrated by its application, and the waiver would serve the public interest; or (2) unique or unusual factual circumstances would make the application of the rule inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. *See* 47 C.F.R. § 1.903(b)(3); *Section 20.19 Waiver*, 22 FCC Rcd at 7176. AT&T makes no attempt to carry its burden.

AT&T had an especially heavy burden to carry in order to justify a waiver of Section 22.911(d) of the Rules given that the “[p]rotection afforded” EKN by that rule gives rise to rights protected by due process. 47 C.F.R. § 22.911(d). The rule first provides that a CGSA is “the area within which cellular systems are *entitled* to protection and within which adverse effects for

the purpose of determining whether a petitioner has standing.” 47 C.F.R. § 22.911 (emphasis added). The rule also provides:

Within the CGSA determined in accordance with this section, cellular systems are *entitled* to protection from co-channel and first-adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block.<sup>8</sup>

\* \* \* \* \*

Cellular licensees are at most *entitled* to have a CGSA free of SABs from other cellular systems on the same channel block.<sup>9</sup>

The word “entitle” means “to give a right or legal title to.”<sup>10</sup> Thus, Section 22.911 gives a cellular licensee the rights to have a CGSA “free of SABs” and to be protected from interference and the “capture of subscriber traffic” within its CGSA. The “adverse effects” threatened by interference and the capture of subscriber traffic within a CGSA are legally cognizable for the purpose of affording the licensee standing to assert its rights to protection under Section 22.911(d).

“In an effort to protect cellular system operators from losing customers, [Section 22.911(d)] established a bright-line rule that subscriber traffic is considered captured when the SAB of the first system overlaps the CGSA of the second system.” *Bachow/Coastal, L.C.C. v. GTE Wireless of the South, Inc.*, 15 FCC Rcd 4484, 4487 (Enf. Bur. 2000). See 47 C.F.R. § 22.911(d)(2)(i) (“Subscriber traffic is captured if an SAB of one cellular system overlaps the CGSA of another operating cellular system”). Thus, Section 22.911(d) protects cellular licensees from economic injury (losing customers), as well as interference. To protect cellular licensees from interference and the capture of subscriber traffic, the rule provides:

[C]ellular licensees must not begin to operate any facility that would cause an

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<sup>8</sup> 47 C.F.R. § 22.911(d) (emphasis added).

<sup>9</sup> *Id.* § 22.911(d)(2)(ii) (emphasis added).

<sup>10</sup> Black’s Law Dictionary 532 (6th ed. 1990).

SAB to overlap the existing CGSA of another cellular system on the same channel block, without first obtaining the written consent of the licensee of that system....Cellular licensees *may* enter into contracts with the licensees of other cellular systems on the same channel block to allow SABs to overlap CGSAs.<sup>11</sup>

Insofar as electrical interference and economic injury are the two established grounds for standing before the Commission and the courts, *see, e.g., MCI Telecommunications Corp., Assignor, and Echostar Corp., Assignee*, 16 FCC Rcd 21608, 21623 n.81 (1999), the rights afforded EKN by Section 22.911(d) to be protected from interference and the capture of subscriber traffic are safeguarded by due process. EKN may agree to surrender its rights, but they cannot be “waived” at the request of AT&T and without due process. And, under the circumstances, due process requires that the Commission take a “hard look” at the Petition<sup>12</sup> and strictly enforce the Section 1.925(b) waiver standard. Even a cursory look at the Petition reveals that AT&T did not even come close to passing the “threshold acceptability test” for waiver requests. *Section 20.19 Waiver*, 22 FCC Rcd at 7176.

At the threshold, AT&T was required to plead with particularity the facts and circumstances which would warrant a waiver of EKN’s right to have its KY 9 and KY 10 CGSAs free of SABs from New Cingular’s operations in VA 1. *See id.* The only facts that AT&T alleged with particularity are that it (not New Cingular):

- (1) holds the B-block license for VA 1;
- (2) filed a modification application that “reflects” SAB extensions into the KY 9 and KY 10 CGSAs;
- (3) made extensive efforts to secure SAB extension agreements with EKN;
- (4) was advised that EKN would not enter into such agreements at this time because it

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<sup>11</sup> 47 C.F.R. § 911(d)(2)(i) (emphasis added).

<sup>12</sup> *Rule 20.19 Waiver*, 22 FCC Rcd at 7176 (quoting *WAIT Radio*, 418 F.2d at 1158).

was modifying its network and would consider a reciprocal agreement;

(5) was provided no additional information about EKN's network modifications or its reciprocal agreements; and,

(6) was given no indications by EKN that New Cingular's SAB extensions were causing any interference or otherwise adversely impacting its network.<sup>13</sup>

None of the facts that AT&T alleged with particularity are relevant under the Section 1.925(b) standard. The underlying purpose of Section 22.911(d) is not to foster SAB extension agreements, but to afford cellular licensees the right to have their cellular systems protected from interference from, and the capture of subscriber traffic by, adjacent systems on the same channel block. *See supra* pp. 4-5. Specific facts showing that AT&T's attempts to get EKN to enter into an SAB extension agreement were unsuccessful obviously do not establish that enforcement of the requirement that AT&T obtain EKN's written consent for the SAB extensions into the KY 9 and KY 10 CGSAs would frustrate the underlying purpose of Section 22.911(d). That being the case, AT&T's general and conclusory claims that a waiver of the prior consent requirement would serve the public interest are unavailing.

Section 22.911(d) provides that cellular licensees "may" enter into contracts that allow SABs to overlap their CGSAs. 47 C.F.R. § 22.911(d)(2)(I). *See also id.* 22.912(b) ("cellular system licensees may enter into contracts to allow SAB extensions"). The rule's use of the word "may" means the licensee's decision to enter into an SAB extension contract is discretionary. *See, e.g., Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 34 (1st Cir. 2011). Inasmuch as Section 22.911(d) leaves the decision to enter into an SAB extension agreement a matter of the licensee's discretion,

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<sup>13</sup> *See* Petition at 6-7, Ex. A, Ex. D.

the rule imposes no obligation on EKN to negotiate such an agreement with AT&T.<sup>14</sup> Consequently, the particular facts alleged by AT&T to show that EKN did not exercise its discretion to negotiate an SAB extension agreement do not establish the presence of “unique or unusual factual circumstances” that would make the enforcement of the requirement that EKN give prior written consent to an SAB extension “inequitable, unduly burdensome or contrary to the public interest.”

Finally, AT&T did not allege specific facts to show that it had “no reasonable alternative” to seeking a waiver of the prior consent requirement. Indeed, AT&T could make no such showing considering that it is seeking a waiver to allow New Cingular to continue to operate facilities with SAB extensions into the CGSAs of KY 9 and KY 10 that it began operating without EKN’s written consent and in violation of Section 1.911(d)(2)(i). *See* Petition at 6-7. The rule that AT&T wants waived contemplates the reasonable alternative that is available to New Cingular. It can reduce the transmitting power or antenna height (or both) at the pertinent cell sites or continue its existing operations until EKN requests that the SAB be removed from its CGSAs. *See* 47 C.F.R. § 22.911(d)(2)(i). If such a request is made, New Cingular must eliminate the SAB extensions. *See Bachow/Coastel*, 15 FCC Rcd at 4489. As the Bureau explained when it enforced Section 22.911(d)(2)(i) in a formal complaint proceeding:

[T]he Rule is clear that the licensee upon being requested to remove its SAB from an adjacent licensee’s CGSA, must proceed to do it, “unless a written consent from the licensee of the other system allowing the SAB to remain is obtained.” Also, no discretion is accorded under the Rule to the licensee of the overlapping system to refuse to remove the SAB when this, in its opinion, would be unreasonable or not in

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<sup>14</sup> A licensee’s unwillingness to negotiate, as alleged by AT&T, may simply reflect a licensee’s preoccupation with other business issues and regulatory obligations. It may also indicate that a licensee is not ready to make counterbalancing changes to its own cellular facilities to mitigate the effects of the proposed contour extension. Whatever the reason, a cellular licensee may properly decline to negotiate SAB extensions, and it should not be compelled to accept SAB extensions through a rule waiver process.

the public interest.<sup>15</sup>

Section 22.911(d) clearly favors a cellular licensee's right to a CGSA free of SAB extensions over an adjacent licensee's interest in continuing to operate facilities in violation of the Rule purportedly for the purposes of "ensuring wireless coverage, facilitating broadband build-out, and promoting the efficient use of spectrum." Petition at 10. The Bureau should deny AT&T's request for a waiver of Section 22.911(d) because it failed to meet the Section 1.925(b) waiver standard. It cannot do otherwise consistent with due process.

**B. New Cingular's Boundary Extension Proposals Appear to be Excessive**

The map included as Attachment 3 of New Cingular's application shows that the proposed SAB extension into KY 10 encompasses all of Letcher County, KY and parts of Perry and Knott Counties of KY 10. Measured from the CGSA boundary, the extension into KY 10 is more than 30 kilometers according to New Cingular's map.

In KY 9, the New Cingular SAB extension includes a substantial portion of southern Pike County and part of Floyd County, KY. The extension into KY 9 exceeds 20 kilometers by New Cingular's showing.

The New Cingular SAB extension also encompasses virtually all of EKN's CGSA that is within the VA 1 CMA. EKN's willingness to serve parts of Dickenson and Buchanan Counties in VA 1, when no other cellular Block B carrier did so, resulted in CGSA rights to EKN in part of VA 1. EKN owns and operates five licensed cell sites in those two Virginia counties.<sup>16</sup> New Cingular's SAB map shows the limit of New Cingular's CGSA in Dickenson and Buchanan Counties without indication that EKN's CGSA is the complementary portion of the two counties.

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<sup>15</sup> *Sagir, Inc. v. N.E. Colorado Cellular, Inc.*, 12 FCC Rcd 1185, 1192 (WTB Enf. Div. 1997).

<sup>16</sup> See Radio Station Authorization KNKN880 held by EKN, Site Location numbers 25, 26, 31, 33 and 45.



On its face, New Cingular's proposal for SAB extensions appears excessive. The costs and time required for EKN to analyze potential call capture in EKN's CGSA, without even reaching engineering and construction costs to counterbalance the New Cingular's extensions, are not necessary or prudent expenditures for EKN at this time.

**C. AT&T Should Not Be Permitted to Dictate Terms for SAB Extension Agreements by Waiver of Rules**

Given that cellular licensees are entitled to protection within their CGSAs from SAB extensions,<sup>17</sup> AT&T should not be permitted by means of the rule waiver process to compel its small and regional competitors to accept signal incursions, let alone to accept them without any conditions or limitations. There is no FCC prescribed form for SAB extension agreements. If a waiver is granted, would small carriers such as EKN have the right to terminate the agreements as is common in many wireless carrier agreements? Or would AT&T obtain by waiver a unilateral and unconditional right to encroach upon the CGSAs of EKN and other carriers?

While the Commission considers major changes to its cellular licensing rules<sup>18</sup> the Bureau should avoid ad hoc rulemaking by waiver. If the Commission determines that the rules should be amended to permit and limit (except by carrier agreement) median field strength to 40 dBuV/m or some other level at the license boundary, all cellular licensees will have the right to modify their systems accordingly. Otherwise the Bureau should respect the right of cellular licensees to negotiate, or not negotiate, for SAB extensions in their CGSAs.

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<sup>17</sup> See 47 C.F.R. §22.911(d).

<sup>18</sup> *Notice of Proposed Rulemaking*, WT Docket No. 12-40, RM No. 11510 at 23 (rel. February 15, 2012).

### **III. The New Cingular Application Should be Dismissed**

Denial of the request for waiver of Section 22.911(d) for any reason will render the captioned application of New Cingular incomplete for lack of an agreement with EKN for extension of cell contours into EKN's CGSA. As an incomplete application without an alternative proposal that complies with the rules, the application is defective and should be dismissed, in accordance with Section 1.925(c)(ii) of the Rules.<sup>19</sup>

Respectfully submitted,

**EAST KENTUCKY NETWORK, LLC**

A handwritten signature in blue ink, appearing to read "Russell D. Lukas", is positioned above the typed name.

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February 20, 2013

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<sup>19</sup> 47 C.F.R §1.925(c)(ii).

## **CERTIFICATE OF SERVICE**

I, Kathleen Mathiasen, hereby certify that on this 20th day of February, 2013, copies of the foregoing COMMENTS OPPOSING PETITION FOR WAIVER; REQUEST FOR DISMISSAL OF APPLICATION were sent by e-mail, in pdf format, to the following:

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Kathleen Mathiasen